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**Subject:** status of state and tribal assumption efforts

This is a brief overview of the latest activity, by states and tribes, pursuing 404(g) authority.

- Arizona –
  - State engaged the tribes last month on their effort to assume the 404 program. It did not go as well as planned and the state is reassessing how to engage the tribes. EPA had offered to assist the state in engaging with the tribes; however, the shutdown interrupted the Region's ability to help facilitate engagement.
  - AZ is also struggling to address key issues being raised by their workgroups – AZ had not anticipated the need to address certain issues such as will there be sufficient waters assumed to enable a fee based system to fully fund the program.
  - In comment letter on 404(g) rule, AZ indicated the off ramps envisioned in FL MOA will not work for them. They want all permits with T&E species issues to be sent directly to USACE.
- Minnesota - Senate Bill SF 962 will be considered in the MN legislature on 2/13. The bill appropriates money for the Board of Water and Soil Resources (BWSR) to develop and assemble material required to assume the Section 404 permitting program under Clean Water Act. Bill gives BWSR until Feb 1, 2021 to submit "the draft agreements with the federal agencies". [https://www.revisor.mn.gov/bills/text.php?version=latest&session=ls91&number=SF0962&session\\_year=2019&session\\_number=0](https://www.revisor.mn.gov/bills/text.php?version=latest&session=ls91&number=SF0962&session_year=2019&session_number=0)
- Florida –
  - The new Governor is interested in continuing FL's efforts to assume the program and has asked Secretary Valenstein to stay on at Florida Department of Environmental Protection (FDEP). EPA continues to work with FDEP staff on this effort but has not received a timeframe for when FL anticipates submitting an assumption request package to EPA.
  - FDEP staff have provided the draft rule to Secretary Valenstein for review; once signed by the Secretary, the rule undergoes an internal 7-day review, then is published, initiating a 21-day public comment period which is followed by seven days for public hearing. If there are no challenges to the rule, it could become final 20-30 days later. This puts assumption request submission to EPA in mid-march at the earliest with a decision in July 2019.
  - ESA – EPA staff have been made aware that FDEP (constituents) do not believe the off ramps in the 5-way MOA are sufficient.
  - FDEP still working with USACE on Retained Waters List – FDEP received a version on 10/4 and anticipates receiving an updated draft from the Corps soon. The current draft of the List is a list of waterbody names without geographic points of reference or heads of navigation identified.
- Michigan
  - Governor Whitmer has written to the MI AG (Dana Nessel) for an opinion about the panels established under NREPA Part 13 (old SB 652 and 653). These bills were signed into law by the previous governor. In response to a request from MDEQ, EPA sent formal comments indicating that the Environmental Rules Review Commission and the Permit Appeal Panel created under these bills, would significantly affect how MDEQ administered its federally approved programs (including under CWA and CAA) and would need to be submitted to EPA for review and approval. Concerns included lack of conflict-of-interest protections found in the CAA, the process is so burdensome that it contravenes federal timing requirements for rule promulgation and permit review, as well as concern that a committee outside the MDEQ could override or dilute provision in state rules that ensure MI's environmental standards are at least as stringent as required by law (e.g., the 404(b)(1) guidelines).

- Menominee appealed the Courts decision to dismiss the tribe's case regarding whether or not MI is the proper permitting authority for a permit along the Menominee River. The Court ordered mediation, but the result of the February 6<sup>th</sup> mediation is that the case is not suitable for mediation. The Tribe's opening brief is due on March 6<sup>th</sup>.
- Oregon –
  - Bill has been introduced this Legislative Session authorizing the Department of State Lands (DSL) to partially assume the CWA section 404 program.
  - DSL is undertaking a nationwide study of costs and revenues needed to operate state-run wetlands and waters regulatory programs. They intend to use the information as they evaluate their own permit and wetland delineation review fee and revenue structure as they pursue assumption. Hope to complete study by June/July 2019.

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